

June 4, 2015

[NOTICE OF CIVIL ACTION PURSUANT TO 33 USC SECTION 1362]

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June 4, 2015

Regional Administrator, EPA New England Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

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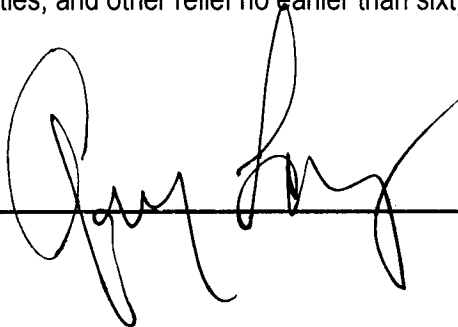
RE: Notice of violations and intent to file suit under the Clean Water Act

To Whom It May Concern:

Plaintiff hereby gives notice to the persons addressed of his intent to file suit pursuant to Section 505 of the Federal Clean Water Act, Section 303 of the Clean Water Act (CWA), 33 U.S.C. §1251 et seq. (1972), and the Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, June 11, 1946, for violations specified in this missive..

This letter constitutes notice pursuant to 40 CFR Part 135 (the "Notice") of the Plaintiff's intent to file suit in United States District Court of the District of Massachusetts seeking appropriate equitable relief, civil and criminal penalties, and other relief no earlier than sixty days after service of this complaint.

Gary Lopez

A handwritten signature in black ink, appearing to read 'Gary Lopez', is written over a horizontal line.

FAILURE TO OBTAIN A NATIONAL POLLUTION ELIMINATION DISCHARGE SYSTEM PERMIT (NPDES)

The CWA was created by Congress to protect waters of the United States by controlling and eliminating sources of pollution. The statute's objective is to "restore and maintain the chemical, physical, and biological integrity of the nations waters (33 USC. § 1251. To achieve this objective the CWA prohibits all persons from discharging "any pollutant" unless done in compliance with federal statutes and rules. *Id at § 1311 (a)*

One of the key tenets of the CWA is the NPDES permit which requires that all "point sources" discharging into the waters of the U.S. must obtain an NPDES permit. *Id at §1342 (a) (1)*. When a pollutant is discharged without an NPDES permit, a citizen with an interest "which is or may be adversely affected" may bring a civil action under the CWA. *Id at §§ 1,3,5,6 (g)*.

The pending civil action falls under Sections 1, 3, 5, 6 (a) (i) and may be brought against any person or entity that violates an "effluent standard or limitation." The term "effluent standard or limitation" is defined as any restriction established by a state or the Administrator on quantities, rates or concentrations of chemical, physical, biological or other constituents that are discharged from point sources into the navigable waters. *Id §1362*. Since a NPDES permit falls within the definition "effluent standard" a citizen suit can be brought when a person or entity discharges without a permit. *Williams Pipe Line Company v. Bayer Corporation 946 F. Supp. 1300, 1317 (1997) (Internal citations omitted)*

DISCHARGE OF A POLLUTANT

The term "discharge of a pollutant" under the CWA is defined as; "any addition of any pollutant to the navigable waters (33 USC 1362 (12). Federal circuit courts have held that when a point source introduces a pollutant into the navigable waters and when that pollutant would not exist in the same form or concentration but for the point source, an "addition" under the CWA occurs. *Rybachek v. EPA 904 F 2nd 1276, 1285, 1286 (9th Circuit 1990)*, *Borden Ranch Partnership v. U.S. Army Corps of Engineers 261 F 3rd 810, 815 (4th Circuit 2000)*,

Federal courts look to the definition of pollutants or pollutants when interpreting this provision. Under the CWA the term pollutant is defined as any dredged soil, solid waste incinerator residue, sewage, sewage residue, sludge, chemical wastes and biological wastes (33 USC 1362 (6) (19).

BACKGROUND

Defendants Town of Barnstable and MADOT own the Point Source conveyance in West 'Barnstable, Massachusetts (W.B. POINT SOURCE) The individual components of the interfused point source are catch basins along Oak Street and Route 132 that are conjoined to three separate interfused outfall pipes on Route 132 (Iyannough Road), Oak Street, and Route 6A in the Village of West Barnstable that

discharge a mixture of storm water and Title V septic system effluent into the MADOT drainage ditch at 1780 Main Street, West Barnstable and a contiguous trench through 1770, and 1700 Main Street, West Barnstable which is linked to Brickyard Creek and Barnstable Harbor.

The Clean Water Act defines a Point Source as; "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container, from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

Initially in 1928 the MADOT trench was constructed prior to the paving of Route 6A to direct storm water runoff into Barnstable Harbor. The outfall pipes on Oak Street and Route 132 were installed in subsequent decades prior to the enactment of the Clean Water Act

The Brickyard Creek, Sandy Neck, Great Marsh, and Barnstable Harbor basin (ESTUARY) is a facet of the ecologically significant 4,000-acre Barnstable Harbor salt marsh and barrier beach system.

The CWA makes it unlawful to discharge any pollutant from a point source into navigable waters, unless a National Pollution Discharge Elimination System permit (NPDES) permit is granted. Since the Brickyard Creek and W.B. ESTUARY does not have a proprietary NPDES permit and the area is excluded from the Town of Barnstable Phase II Stormwater MS-4 General Permit, the discharge of pollutants via the W.B. POINT SOURCE is a clear violation of the CWA.

Defendants, USEPA, MADEP, and SMAST are jointly responsible for establishing, approving, and monitoring NPDES permits and Total Maximum Daily Loads (TMDL's).

A copy of the USEPA NPDES Phase II stormwater designated area is depicted on the next page.

Under section 303(d) of the Clean Water Act states are required to develop lists of impaired waters, or those that are too polluted or otherwise degraded to meet the water quality standards. The CWA requires that these jurisdictions establish priority rankings for waters on the lists and develop TMDLs for these waters. A Total Maximum Daily Load, or TMDL, is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards.

In 2009 Defendants USEPA and MADEP published the Final Pathogen TMDL (REPORT) for 68 water body segments in the Cape Cod Watershed. The coversheet of the Final Pathogen TMDL for the Cape Cod Watershed is depicted below.

Of the 68 water body segments analyzed, only Barnstable Harbor at the W.B. ESTUARY was assigned a "High Priority" designation. The W.B. ESTUARY's "High Priority" assignment applies to both "Wet" and "Dry" periods which supports Plaintiff's claim that effluent from Title V leach fields is the primary source of pathogen pollution carried into Barnstable Harbor via the W.B. POINT SOURCE. The page that assigns Barnstable Harbor the "High Priority" designation is posted on Page 6.

The Pathogen TMDL defines "High Priority" as those segments where concentrations (end of pipe or ambient) were equal to or greater than 10,000 cfu /100 ml. The Pathogen TMDL further states the "High

Priority" segment designation **"is indicative of the potential presence of raw sewage and poses a greater risk to the public."**

The Pathogen TMDL cites remediation goals for pathogen impairment are;

- a. *"Complete elimination of illicit sources."*
- b. *"100% reduction of pathogens should be an iterative process by first prioritizing areas based on available data while considering their impact to downgradient resources."*
- c. *"This information should then be used to identify and remove specific sources including the removal of illicit connections (if applicable) contributing to wet and dry weather violations."*
- d. *"Once illicit connections are removed then priority should be given to identifying and implementing best management practices (BMPs) to mitigate stormwater runoff."*

Six years have elapsed since the Cape Cod Watershed Pathogen TMDL was published and not only hasn't there been a single effort to mitigate or abate the pathogen pollution, but also neither the USEPA nor the MADEP, can produce a single water quality pathogen test report for the waterbody. USEPA claims it is not empowered to manage TMDL's while MADEP (Worcester, Chris Deering) claims to have an awareness of pathogen impairment but has done nothing to identify and mitigate the source [s] of the pathogens.

The Town of Barnstable altered its GIS map of 1770 and 1700 Main Street by erasing the MADOT drainage trench to mislead viewers into thinking the W.B. POINT SOURCE does not exist.

MADEP and USEPA have pled "Mickey the Dunce" evidenced by the Massachusetts Executive Office for Administration and Finance GIS Online Mapping System for the same properties that clearly depicts the W.B. POINT SOURCE

The Clean Water Act (CWA), 33 U.S.C. §1251 et seq. (1972), Section 304 (4) FALSE STATEMENTS.—
"Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who knowingly falsifies, tampers with, or renders inaccurate any method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both." The scope of the CWA is limited to the "navigable waters" of the United States that are broadly defined to include wetlands, or areas that are underwater at times, but dry at other times, as well as areas directly adjacent to navigable waters.

The Clean Water Act authorizes USEPA and MADEP to regulate point sources that discharge pollutants into navigable waters of the United States through the NPDES permit program to maintain and restore the chemical, physical and biological integrity of US waters. In Massachusetts NPDES permits are jointly issued by the US EPA and MADEP that are equally and separately enforceable by both agencies.

Certain towns in the watershed are classified as Urban Areas by the United States Census Bureau and are subject to the Stormwater Phase II Final Rule that requires the development and implementation of an illicit discharge detection and elimination plan. The USEPA classifies the ESTUARY as non-urban, ergo exempt from NPDES permits and TMDL mitigation. 40 CFR 122.26(b)(8) cites *"Phase II permits require regulated small MS4s in urbanized areas, **as well as small MS4s outside the urbanized areas that are designated by the permitting authority for their stormwater discharges.**"*

MADEP, USEPA, and Town of Barnstable violated the CWA and 40 CFR 122.26 (b)(8) because each regulated MS4 is required to develop and implement a storm water management program (SWMP) to reduce the contamination of storm water runoff and prohibit illicit discharges outside the urbanized area.

MS4 permit holders are required to obtain NPDES permits to develop storm water management programs and prevent harmful pollutants from being washed or dumped into an MS4 permit areas. Plaintiff asserts the most, if not all, pathogens were carried into the ESTUARY via the illicit MADOT and town of Barnstable-owned (W.B. POINT SOURCE), The W.B. ESTUARY is NOT mentioned in any of the town of Barnstable's NPDES Phase II Small MS-4 General Permit Annual Reports signed by the Town Manager (under the penalties of perjury.)

In addition to failing to mitigate and eliminate pathogen impairment in the W.B. ESTUARY MADEP, USEPA, failed to establish or approve a total nitrogen TMDL for the W.B. ESTUARY despite the fact the area is the largest eelgrass bed between Provincetown and Cape Ann.

Failure to approve a Total Nitrogen TMDL for the W.B. ESTUARY has resulted in harmful algae blooms, excessive nuisance plant growth, low dissolved oxygen levels and high levels of nutrients and nitrogen (typically in the 20 mg/l range due to effluent).

Each state must identify waters within its boundaries where the restrictions on discharges from point sources "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. §1313(d) (1) (A); see also *Upper Blackstone*, 690 F.3d at 14 ("The CWA also requires states to identify the waters within their boundaries that fail to meet their designated water quality standards.").

Where limitations on point source discharges are insufficient to achieve the requisite water quality standards, each state is required to establish a Total Maximum Daily Load (TMDL) for each relevant pollutant. 33 U.S.C. §1313(d)(1)(C) *Upper Blackstone*, 690 F.3d at 14 n.8"

A Total Maximum Daily Load (TMDL) is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that load among the various sources of that pollutant. TMDL's are technical planning documents and are not, in and of themselves, enforceable documents requiring compliance. TMDL's quantify goals for reducing or eliminating pollutants that degrade conditions in a water body which are measured qualitatively by the CWA. Those bodies of water are called a "water quality limited segment." 40 C.F.R. §130.2 (*Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002)).

A TMDL is, in essence, a pollution budget, and it represents a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards." *Am. Farm Bureau Fed'n v. U.S. Env'tl. Protection Agency*, 278 F.R.D. 98, 101 1

"Loading capacity" is defined the "greatest amount of loading that a water can receive without violating water quality standards." 40 C.F.R. §130.2(f). "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. §1362(11). 6 (M.D. Pa. 2011).

The theory of a TMDL "is that individual-discharge permits will be adjusted and other measures taken so that the sum of [a] pollutant in the water body is reduced to the level specified by the TMDL." *Meiburg*, 296

F.3d at 1025. Under the EPA's regulations, TMDLs are calculated as "the sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. §130.2(i)

Pollutant sources are characterized as either point source that receive a Waste Load Allocation (WLA), or nonpoint sources that receive a Load Allocation (LA). Point sources include all sources subject to regulation under the NPDES program.

Plaintiff asserts both subsurface and surface (via capillary action from water saturated soil) leach field effluent is carried into the three storm water outfall pipes on Iyannough Road, Oak Street and Route 6A from; Cape Cod Community College, 2240 Iyannough Road (5,000 students, faculty, service employees) on 44 acres, the town of Barnstable-owned YMCA, 2245 Iyannough Road (9 acres), and (hundreds of daily member), the Kimber Wood affordable home development, 2241 Iyannough Road (100 residents) built in 2009 on the YMCA lot, the Cape Cod Conservatory, 2235 Iyannough Road, (100 students/faculty) 14 acres, the state-owned Burger King/Dunkin Donut-leased rest stop, 2145 Iyannough Road, (3000 patrons per day) on 10 acres, and the state-owned Mobil Station, 2145 Iyannough Road (1,500 patrons per day) on 5 acres.

The combined 80 acres of development on Iyannough Road, less impervious surfaces, is insufficient for leach fields to process wastewater generated by 10,000 persons on a daily basis. Without factoring pavement and structures the 80 acres leaves 0.008 acres of leach field per person which is 98.2% less than the two-acre zoning standard for West Barnstable.

THE CWA REQUIRES DEFENDANTS TO FACTOR EXISTING WITH FUTURE NONPOINT SOURCES OF POLLUTION WHEN CALCULATING "LOADING CAPACITY" (LC)

In its 2007 EOEA14896 Executive Office of Environmental Affairs (MEPA) approved the town of Barnstable's plan to inject 1.3 million Gallons Per Day (GPD) of effluent from the HWPCF into the former McManus property on Route 132 (1910 Iyannough Road, West Barnstable) which is catty-corner from the MS/BK, and 3/8ths of a mile upgradient of KW, CCCC, CVM, and the YMCA.

In its ENF Barnstable, reported that "1 million of the 1.3 million gallons of effluent will flow into Brickyard Creek" and the ESTUARY. The ENF quotes SMAST's Brian Howes', PHD; "sic; "while there is only preliminary data available, it indicates Brickyard Creek is not impaired, therefore the level of effluent would have minimum effect". Other claims by Ells in the ENF filing;

- a) "The McManus site is located in the watershed to Barnstable Harbor and USGS modeling indicated that approximately 1.0 million gallons per day (MGD) of the 1.3 MGD will recharge into Barnstable Harbor in the area of Brickyard Creek which is an Area of Critical Concern (AOC)"
- b) "The town [Barnstable] has contracted with the MEP and UMass Dartmouth (SMAST) to develop critical nitrogen limits (TMDL) for this area (Brickyard Creek) "which are scheduled for completion in 2008"

In the subsequent EOE 13526 ENF filing the town included a computational map of the estimated, environmental impacts of 1 MGD of effluent on the ESTUARY.

In its 2005 EOE 13526 ENF the town of Barnstable reported.

- b. *"The Town has worked to coordinate its wastewater planning efforts with the construction of the Route 132 Improvements Project. This project will widen and improve Route 132 from Route 6 Interchange No.6 to the Benares's Way intersection."*
- c. *"This section of road is the route of a needed effluent force main to convey well-treated effluent to a new effluent disposal site near Route 6 Interchange No.6."*
- d. *"It is also the route of a needed sewer extension to connect Cape Cod Community College to the Hyannis WPCF (the community college is located very near Route 6 Interchange"*

The McManus and YMCA developments were simultaneous with the Final Pathogen TMDL and should have been factored with future Loads.

In 2006 Defendant, town of Barnstable, owner of the YMCA property, asked for and received a hardship exemption from the Cape Cod Commission (CCC) Development of Regional Impact (DRI) process to virtually double the size of the building (from 20,000 square feet to 39,000 square feet) and double the capacity of YMCA's Title V septic tank.

The CCC in its hardship exemption conclusion the agency stated;

- a. *The proposed addition to the YMCA has the potential to impact regional water."*
- b. *"Preliminary assessments completed by the Massachusetts Estuaries technical team indicate that the system is currently not impaired."*
- c. *"There will be a significant increase in wastewater based on an increase in the locker room area."*
- d. *"Wastewater will be disposed of in a traditional Title V design septic system without the addition of a denitrifying system."*
- e. *"The YMCA agrees to connect to town sewer as soon as the extension main becomes available in this area."*
- f. *"Nitrogen loading calculations performed by Coastal Engineering dated March 30, 2006 for the project show a slight increase in nitrogen loading remains below 10 parts per million."*
- g. *"Stormwater will flow to catch basins in an abandoned leaching area."*

In 2009 the town of Barnstable completed the KW 28-unit low-income housing development and connected the units to a Title V septic system to a poor-functioning leach field adding even more effluent to the W.B. POINT SOURCE.

The CWA was established with the goal of restoring and protecting water quality. CWA § 101(a), 33 U.S.C. § 1251(a). It aims to eliminate "the discharge of pollutants into the navigable waters and to attain water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."

The CWA defines "navigable waters" as "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7).

The W. B. ESTUARY and Cape Cod Bay are waters of the United States as that term is defined in EPA's implementing regulations. 40 C.F.R. § 122.2.

States must submit their TMDLs to the EPA Regional Administrator for approval. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2), 40 C.F.R. § 130.7.

EPA approval of a state-submitted TMDL is final agency action reviewable under the APA.

Nitrogen, pathogen, e-coli bacteria, fecal matter, BOD's, COD's, and turbidity are devastating problems for the ESTUARY ergo MADEP, and EPA's failure to require an NPDES permit for the ESTUARY is arbitrary and capricious, an abuse of discretion, and are violations of the APA, 5 U.S.C. § 706 (2), and 33 U.S.C. §1251 et seq. (1972).

Defendants failure to connect Cape Cod Community College, the YMCA, Cape Cod Conservatory, the Kimber Wood affordable housing development, the Burger King/Dunkin Donut rest stop, and the Mobil Station to the HWPCF to mitigate and abate the pathogen-impaired W. B. ESTUARY is arbitrary, capricious, an abuse of discretion and violations of APA, 5 U.S.C. § 706 (2), and 33 U.S.C. §1251 et seq. (1972).

Defendants' decision to add more pathogens to the ESTUARY through the McManus wastewater dump site, the YMCA expansion, and the construction of the Kimber Wood affordable housing development is arbitrary, capricious, an abuse of discretion and violations of APA, 5 U.S.C. § 706 (2), and 33 U.S.C. §1251 et seq. (1972).

The discharge of pathogen pollutants from the W.B. POINT SOURCE is unlawful without a NPDES permit. CWA § 502(14), 33 U.S.C. §1362(14); 40 C.F.R. § 122.2 in 1972.

The town of Barnstable's granting of shellfish aquaculture permits that cumulatively produce more than 50 tons of shellfish each year in an area without a NPDES permit violates CWA § 502(14), 33 U.S.C. §1362(14);

USEPA and MADEP's refusal to approve a NPDES permit for the W.B. ESTUARY and the Town of Barnstable's refusal to ask the W.B. ESTUARY be included in its while assigning Barnstable Harbor the "highest priority: pathogen impaired of 68 waterbody segments is arbitrary and capricious, an abuse of discretion and otherwise not in accordance CWA § 502(14), 33 U.S.C. §1362(14); 40 C.F.R. § 122.2; APA § 706(2), 5 U.S.C. § 706(2).

Defendants failure to establish and approve a total nitrogen TMDL for the ESTUARY is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the CWA as well as arbitrary and capricious, an abuse of discretion and otherwise not in accordance CWA § 502(14), 33 U.S.C. §1362(14); 40 C.F.R. § 122.2; APA§ 706(2), 5 U.S.C. § 706(2).

Defendants failed to include an adequate margin of safety that takes into account lack of knowledge concerning the relationship between effluent limitations, percolation, and water quality. CWA § 303(d) (1) (C), 33 U.S.C. § 1313(d) (1) (C); APA§ 706(2), 5 U.S.C. § 706(2).

Defendants failure immediately terminate the source of pathogen impairment in the ESTUARY by dismantling the Title V septic systems as the CCCC, YMCA, CVM, KW, BK, and MS or implement pathogen TMDL protocol is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the CWA and the APA. CWA § 303(d) (1) (C), 33 U.S.C. § 1313(d) (1) (C); APA§ 706(2), 5 U.S.C. § 706(2).

Plaintiff, Gary Lopez's primary residence since 1987 is 37 Gleneagle Drive. Lopez has sailed in the Sandy Neck area since 1978 and has standing to sue.

Mailed on the 4th Day of June, 2015

Gary Lopez, Plaintiff

